No. 15582

United States
Court of Appeals
For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation

Appellee.

Brief for Appellant

Appeal from the United States District Court
for the District of Oregon

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STATEMENT OF THE CASE

This action was brought by the Union Pacific Railroad Company to recover from Ore-Ida Potato Products, Inc., undercharges on shipments of frozen French fried potatoes transported in interstate commerce by the rail lines of plaintiff and connecting carriers. The amount sought to be recovered, as stated in the Pre-Trial Order is $6,236.86 (R. 14). The defendant counterclaimed for overcharges on similar shipments in the amount of $5,331.24, as shown in the Pre-Trial Order (R. 15).

Upon the trial, the issues were submitted to the Court without a jury, the Court having reserved his ruling on plaintiff's motion for summary judgment. The Court, after hearing oral testimony on behalf of defendant, over plaintiff's objection, made Findings of Fact and Conclusions of Law and entered judgment on March 18, 1957 in favor of defendant (R. 22). Notice of Appeal was filed April 15, 1957 (R. 23).

Jurisdiction

Jurisdiction is predicated upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U.S.C.A., Title 49, Chapters 1 and 2), and acts amendatory thereof and supplemental thereto (R. 10-17). The jurisdiction of this Court to review the judgment is based upon 28 U.S.C., § 1291.

The Facts

The Agreed Facts in the Pre-Trial Order (R. 10-14) reveal that between January 6, 1954 and October 2, 1955, the defendant delivered to plaintiff at Ontario, Oregon, with charges prepaid, approximately 114 shipments of frozen French fried potatoes, with directions that each of such shipments be transported by the rail lines of plaintiff and connecting carriers to destinations in the Eastern, Middle Western and Southern districts of the United

States. The shipments were accordingly transported and delivered to the consignees designated by defendant (R-11, 12).

The applicable freight tariff is a general commodity freight tariff, Item 4600 (Part 3) of which prescribed carload rates on "food cooked, cured, or preserved, frozen NOIBN in containers in boxes." (The letters "NOIBN" are abbreviations of the words "Not Otherwise Indexed By Name.") (R. 12; Def. Ex. 2). Item 4715 of said tariff prescribed carload rates on "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables, either sweetened or not sweetened), in packages as prescribed in Western Classification (Subject to Notes 1 and 6)." (Said Notes 1 and 6 do not affect the issues in this case.) (R. 12; Def. Ex. 1) The Item 4600 rates were higher than the Item 4715 rates.

On certain of the shipments of French fried potatoes plaintiff collected the Item 4715 rates instead of the higher Item 4600 rates. This gave rise to plaintiff's undercharge claim of $6,236.86 (R. 14). On certain of the shipments, plaintiff collected the Item 4600 rates. This gave rise to defendant's counterclaim for overcharges in the amount of $5,-331.24 (R. 15).

As stated in Paragraph XI of the Pre-trial Order (R. 13) the frozen French fried potatoes had undergone the following handling and processing after harvesting:

"The potatoes referred to above were hauled from farmers' fields or warehouses, washed, peeled, sliced, steamed or washed, and oil blanched, and then quick frozen.

"The oil blanching consisted of immersing the sliced potatoes in blanching oil at 350°F for one and one-half minutes. They were partially browned by the oil blanching. They were cooled and quick-frozen to a temperature of –15° to –20°F, packaged, labeled, and stored in zero storage. They were shipped in refrigerated cars of the plaintiff. The purpose of blanching was to kill the enzymes in the raw potato and to stop bacterial decay. The purpose of freezing was to prevent spoilage and to preserve potatoes in a fresh condition."

The foregoing Agreed Facts were incorporated in substantially the same language, in the Findings of Fact entered upon the Trial Court's decision (R. 17-21).

The Issues

The underlying issue of the case is very simply defined in the Pre-Trial Order as:

"Were the potatoes which constitute the shipments described in Paragraph IV of the Agreed Facts 'food cooked' as classified in Item 4600 of the tariffs described in Paragraph V of the Agreed Facts, or were said potatoes 'vegetables, fresh' as classified in Item 4715 of said tariffs." (R. 15)

A secondary issue arises by reason of the Trial Court's admission in the record of oral evidence and exhibits extrinsic to both the Agreed Facts and the tariff. Throughout the trial, plaintiff took the position that there was presented only a question of law, and that no oral testimony was warranted (R. 31, 54). The Court, however, admitted in evidence the oral testimony of defendant's witness, and also defendant's Exhibits 1, 2 and 3, which consisted of sample labels in which the packaged French fried potatoes were wrapped (R. 30-54).

The Record on Appeal

Consistent with its legal position, appellant omitted from its designation of the record the transcript of testimony before the trial court, as well as defendant's Exhibits 1, 2 and 3. Such proceedings, however, were included in the record by virtue of appellee's additional designation of the record (R. 58, 59).

SPECIFICATIONS OF ERROR

The specifications of error to be discussed are set forth in the Statement of Points on Which Appellant Intends to Rely (R. 55-57). For purposes of argument, the following grouping is indicated in relation to the two issues discussed above:

I.

The Trial Court erred:

(a) In refusing to grant plaintiff's Motion for Summary Judgment (R. 57).

(b) In its Finding of Fact that the potatoes did not lose their substantial identity by the processing described and were frozen fresh vegetables, not a frozen cooked food; and in failing to conclude that the frozen French fried potatoes by reason of the processing described lost their identity as raw potatoes or fresh vegetables, but were a frozen cooked food (R. 55, 56).

(c) In its Conclusion of Law that the process described involved the preservation of potatoes by blanching and freezing; that the potatoes were not cooked; that they should not be properly classified under tariff Item 4600; and in failing to conclude that the process described involved the preparation of potatoes for consumption by the action of heat and rendered the product "a food cooked, cured or preserved" within the meaning of tariff Item 4600 (R. 55, 56).

(d) In its Conclusion of Law that the French fried potatoes were properly classified as frozen vegetables under tariff Item 4715; and in failing to conclude that the frozen French fried potatoes were not properly classified as "vegetables, fresh or green" within the meaning of tariff Item 4715 (R. 56).

II.

The Trial Court erred in admitting as evidence in the record the oral testimony of defendant's witness and defendant's Exhibits 1, 2 and 3 (R. 30-54).

SPECIFICATION OF ERROR I

Summary of Argument

1. If the words of a tariff are used in their ordinary sense, their construction presents solely a question of law.

2. The language of a tariff must be read fairly and reasonably in the light of every word, clause and sentence, each according to its ordinary meaning.

3. The commodities embraced by Item 4600 ("cooked" food) are those which are not in their raw and natural state, even though they may not have been completely processed for human consumption.

4. The commodities embraced by Item 4715 ("fresh or green" vegetables) are those which are readily identifiable as being in their raw and natural state, and adaptable to purposes common to the raw product.

5. The frozen French fried potatoes are a "food, cooked, cured or preserved, frozen" and are properly classified under Item 4600.

Argument

The essential facts having been agreed upon, the Court is concerned solely with the application of the plain, unambiguous language of the tariff to the commodity in question.

1. ***A Legal Issue***

In *Great Northern Ry. Co. vs. Merchants Elevator Co.,* (1922) 259, U.S. 285, the United States Supreme Court said (p. 290):

> "Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law."

And likening a tariff to any other document, said (p. 291):

> "But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.
>
> "When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law."

It concluded (p. 294):

> "Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts."

In *Pennsylvania R. Co. vs. Fox & London,* (1938) 93 F.2d 669, the Court said (pp. 670, 671):

> "And, moreover, where the terms of the published tariff are themselves unambiguous, the

issue must be resolved by reference to the rate published, treating it as established law like any plain statute, leaving only the incidental issue of applicability which is dependent only upon the fact of the nature of the commodity shipped. Properly speaking, no construction of a tariff is involved where the only controversy is whether the commodity shipped is one or another of two things plainly classified. That was the real issue here, and, because that is so, much of the argument as to tariff construction generally is beside the point."

In *United States vs. Missouri-Kansas-Texas R. Co.*, (1952) 194 F.2d 777, the Court observed (p. 778):

"The construction of a printed railroad tariff presents a question of law and does not differ in character from that presented when the construction of any other document is in dispute."

and having stated its interpretation, said at page 779:

"This is the clear, unambiguous meaning of the words used in the tariff and is alone the intention to which the law gives effect."

In *Reading Company vs. Penn Paper And Stock Co.*, (1955) 134 F. Supp. 239, the Court said (p. 242):

"There is no dispute as to the facts, no question as to the exercise of administrative discretion, but merely one of construction as to which rates applied to this particular shipment. Under such circumstances it has been held that this Court

can decide the issue. W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., 6 Cir., 1936, 82 F.2d 94; Louisville & N. R. Co. v. United States, D.C.W.D. Ky. 1952, 106 F.Supp. 999; American Ry. Express Co. v. Price Bros., 5 Cir., 1931, 54 F.2d 67."

Stated in another way, the Court in *Northwestern Auto Parts Co. vs. Chicago, B. & Q. R. Co.,* (1956) 139 F. Supp. 521, said (p. 523):

"The sole issue is as to the nature of the material shipped for rate purposes. This is the only issue the court is empowered to decide. See Sonken-Galamba Corp. v. Union Pac. R. Co., 10 Cir., 1944, 145 F.2d 808."

See also *Black vs. Southern Pac. Co.,* (1918) 88 Or. 533.

2. *Fair and Reasonable Construction*

In *United States vs. M.K.T. Ry. Co.,* supra (194 F.2d 777), the Court said (pp. 778, 779):

"The four corners of the instrument must be visualized and all the pertinent provisions considered together, giving effect so far as possible to every word, clause, and sentence therein contained. The construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed, and any ambiguity or reasonable doubt as to their meaning must be resolved against the carriers. But claimed ambiguities or doubts as to the meaning of a rate tariff must have a

substantial basis in the light of the ordinary meaning of the words used and not a mere arguable basis. Hohenberg v. Louisville & N. R. R. Co., 5 Cir., 46 F.2d. 952; Christensen v. Northern Pac. Ry. Co., 8 Cir., 184 F.2d 534; Norvell-Wilder Supply Co. v. Beaumont, Sour Lake & Western Railway Company, 274 ICC 547."

In *Western Grain Co. vs. St. Louis-San Francisco Ry. Co.,* (1932) 56 F.2d 160, the Court said (p. 161):

"Further, tariffs having as they do the effect of law, the language in them must be construed fairly and reasonably, in accordance with the meaning of the words used, and not distorted or extended by forced or strained construction."

Cited with approval in *Great Northern Ry. Co. vs. Armour & Co.,* (1939) 26 F. Supp. 964, 967.

See also *Carnegie Steel Company vs. Baltimore & Ohio Railroad Company,* (1928) 144 ICC 509, 510.

3. Item 4600 Controls

The description of the commodities embraced by the relevant portion in Part 3 of this item is "food, cooked, cured or preserved, frozen."

The word "cook" is defined in Webster's New International Dictionary, 2nd Edition, as:

"1. To prepare (food) by boiling, roasting, baking, broiling, etc.; to make suitable for eating, by the agency of fire or heat; hence, in technical processes, to prepare or treat by, or as by, similar action of heat."

In *The Caterina Gerolimich* (1930), 43 F.2d 248, 251, the Court noted the connotation of "cooked" in relation to onions which had spoiled in the hold of a ship, as "meaning heated to the cooking point by exterior forces."

Reference to other words or phrases in a tariff is appropriate in determining the meaning of the word in question. (*Carpenter vs. Texas & New Orleans R. Co.,* 89 F.2d 274; *Harrison Eng. & Const. Corp. vs. Atchison, T & S. F. Ry. Co.,* 78 F. Supp. 906; *Black vs. Southern Pac. Co.,* supra (88 Or. 533).)

We accordingly turn to the word "cure" and find it defined in Webster's New International Dictionary, 2nd Edition, as:

> "3. To prepare for keeping or use; to preserve as by drying, salting, etc.; as, to cure fish; to cure hay, tobacco."

As used in the meat packing industry, the term "curing" has been defined in *Commonwealth vs. Clark,* 25 At.2d 143, as the treating of meat with "salt, smoke, etc." and the Court held that merely placing it under refrigeration does not change its character as "fresh" meat.

The term "preserve" in the context here used is defined in Webster's New International Dictionary, 2nd Edition, as:

> "2.a. To save from decomposition, as by refrigeration, curing, or treating with a preservative;

as to preserve specimens or skins to be stuffed; to preserve milk indefinitely."

Judicial definitions of the words in this tariff are meager, probably because they are words of common usage and their meaning well known. However, if we consider the term "cooked" in conjunction with the terms "cured" and "preserved", we find the implication of a permanent change in character of the food from its raw state. The food has been in preparation for human consumption, but such preparation need not be completed. The preparation, however, must have progressed beyond the stage where the food is still identifiable as being in its raw and natural state. The process admittedly must have gone beyond water blanching and freezing, which do not change the appearance or limit the variety of uses of the raw product.

Following the rule of construction stated in *United States vs. M.K.T. Ry. Co.*, supra (194 F.2d 777) that "the four corners of the instrument must be visualized," we turn to other provisions of Item 4600 which are shown on defendant's Exhibit 1. Part 2 includes commodities described as follows:

"Pies, fish, meat or poultry, cooked, cured or preserved, with vegetable ingredients and seasoning, *with unbaked pie crust,* frozen solid, in inner containers in boxes."*

*All emphasis in quoted matter in this brief are ours unless otherwise indicated.

and:

> "Vegetables, with or without meat ingredients, cooked, frozen solid in inner containers in boxes."

The commodities included in this Part move at higher minimum weights than those in Part 3. Other commodities included in Part 3 are:

> "Pies, fish, meat or poultry, cooked, cured or preserved, with vegetable ingredients and seasoning, *with unbaked pie crust,* frozen solid, in inner containers in boxes."

The significant feature of these references is the character of the commodities as cooked foods; but, as indicated in italics, they need not be completely cooked, ready for consumption.

4. *Item 4715 Not Applicable*

The description of the commodities embraced by the relevant portion of this item is

> "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables, either sweetened or not sweetened) in packages."

The term "fresh" is defined in Webster's New International Dictionary, 2nd Edition, as:

> "1. Newly produced, gathered, or made; hence, not stored or preserved, as by pickling in salt or vinegar, refrigeration, etc.; as, *fresh* vegetables, fruit, etc.; *fresh* tea, raisins, etc.
>
> "7. Having its original qualities unimpaired."

The term "green" is defined in Webster's New International Dictionary, 2nd Edition, as:

> "6. Grown above the ground; more narrowly, leafy;—applied to certain vegetables, as peas and spinach, to distinguish them from roots, as beets and carrots."

In *J. Hamburger Co. vs. Atlantic Coast Line R. Co.*, 229 ICC 795, the Interstate Commerce Commission said at page 796:

> "The word 'green' used in conjunction with vegetables generally means fresh in the sense of newly gathered."

The few definitions available convey the commonly understood meanings of the terms "fresh" and "green" as applied to potatoes. The fresh or green potatoes must be in a raw state having the appearance of raw potatoes and usable for the variety of purposes to which a raw potato may be devoted. The extension of the tariff classifications to permit water blanching and freezing is merely a qualification which cannot lawfully be expanded in defiance of rate-making rules.

5. *The Commodity—Frozen French Fried Potatoes*

The common, ordinary meaning of the words "French fried potatoes" is set forth in Webster's New International Dictionary, 2nd Edition, as follows:

> "Potatoes cut into strips and *cooked* by frying deep fat."

The characteristics of the product are its size and shape, and the French frying process to which it has been subjected. The process as described shows that in addition to the water blanching process, the potatoes have been immersed in oil and partially browned. After freezing, they are packaged and labeled as such.

Standards for commercially sold agricultural commodities are controlled by the Federal Food, Drug, and Cosmetic Act, and regulations prescribed by the Department of Agriculture, and tariffs prescribing rates on such commodities are intended to be consistent in terminology and classifications, with such requirements. Section 52.2391 of Title 7, Code of Federal Regulations, describes frozen French fried potatoes as prepared and sold by defendant:

> "Frozen french fried potatoes are prepared from mature, sound, white or Irish, potatoes (Solanum tuberosum). The potatoes are cleaned, peeled, sorted, trimmed, washed, cut into strips, and are deep fried in a suitable fat or oil. They are frozen in accordance with good commercial practice and stored at temperatures necessary for the preservation of the product."

Section 52.2396 describes color standards as follows:

> "Frozen french fried potatoes that possess a good color may be given a score of 25 to 30 points. 'Good color' means that the units possess a characteristic light cream to golden color typi-

cal of properly prepared frozen french fried potatoes; that the product is bright, practically uniform in color and, after heating, is practically free from units which vary markedly from the predominating color."

As a contrast to the above processing, we call attention to Section 52. 2421 describing "peeled potatoes" (which may be cut into various shapes and sizes):

" 'Peeled potatoes' are clean, sound, fresh tubers of the potato plant prepared by washing, peeling, trimming, sorting, and by proper treatment to prevent discoloration, by the use of sulfur dioxide (SO_2) or other means which may be permissible under the provisions of the Federal Food, Drug, and Cosmetic Act. The product is properly packed in suitable containers and securely closed to maintain the product in a sanitary condition."

These contrasting descriptions emphasize the basic distinction between the French fried potato and the fresh or green potato.

By being subjected to the processing described in the Pre-Trial Order (R. 13), we submit that the French fried potato has undergone the very same process which, if resumed for a short time (1½ to 2½ minutes) (R. 36), would complete preparation for the table. The state of preservation of the potato exceeds that afforded by the water blanching

process to which it has already been subjected (R. 44). Identity with its raw state has been lost by its cooking, distinctive shape and brown coloring. However, of particular significance is the fact that the housewife or commercial user can no longer use it for anything but a French fried potato; nor can it be served creamed, or used in salad. In short, its general utility as a raw potato has been destroyed. These facts are matters of common knowledge of which the Court will take judicial notice.

Sec. 203 (b)(6) of the Interstate Commerce Act (49 USCA 303 (b) (6)) exempts from the application of Part II of the Act:

> "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shellfish), or *agricultural (including horticultural) commodities (not including manufactured products thereof),* if such motor vehicles are not used in carrying any other property or passengers, for compensation." (Emphasis ours)

The relevance of decisions under this Act (as to whether commodities are in their natural state or "manufactured") to the issues before this Court lies in mutuality of purpose. In *East Texas Lines vs. Frozen Foods Express,* (April, 1956), 351 U.S. 49, the Court reviewed the legislative history of the exemption provision and concluded that the exemption "was designed to preserve for the farmers

the advantage of low-cost motor transportation" (p. 51). The purpose of the tariff classification now before this Court was to provide lower freight rates on agricultural commodities in their natural state than on those subjected to a higher degree of processing.

In *Home Transfer & Storage Co. vs. U.S.*, 141 F. Supp. 599, aff'd (November 1956) 352 U.S. 844, the United States District Court for the Western District of Washington, Northern Division, was called upon to determine the following question arising under the exemption provision (p. 600):

> "Are frozen fruits and frozen vegetables agricultural commodities or manufactured products thereof?"

The processing applied to the frozen fruits and vegetables was reviewed by the Court (p. 600):

> "Generally speaking, the quick freeze processing here contended by defendants to create non-exempt 'manufactured products' is as follows: To all fruits are added sugars and sirups, and to only peaches ascorbic acid also is added. Vegetables are washed, then blanched by heating them to temperatures high enough to kill the enzymes and then reduced to near zero temperature and uniformly kept that way. Stalky vegetables are sometimes split and less frequently a core is removed to facilitate blanching. Rhubarb is the only vegetable not so blanched, but to it sugar is added. The require-

> ment of uniform maintenance of near zero temperature after the quick freeze processing applies to all fruits and vegetables."

The Court applied the test adopted by the United States Supreme Court in *East Texas Lines vs. Frozen Foods Express,* supra, (351 U.S. 49), quoting from p. 54 of that report:

> " 'At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been "manufactured" within the meaning of § 203(b)(6).' "

and held that the processing above described did not render the fruits and vegetables "manufactured products."

An important sequel to this decision occurred in *W. W. Hughes-Extension-Frozen Foods,* MC 105782 Sub (3), where applicant sought a certificate of public convenience and necessity to transport by motor vehicle "fresh, cold-packed and frozen agricultural commodities, fish, sea food, and other frozen foods" between various points in the United States. In its very recent decision dated April 16, 1957, the Commission, by Division 1, adopted the Examiner's report, which concluded that certain of the commodities sought to be transported were exempt under § 203(b)(6) of the Interstate Commerce Act, citing *Home Transfer & Storage Co.*

vs. U.S., supra, as authority therefor. These commodities are described in Footnote 2 to the decision as follows:

> "Fruits and vegetables which are washed, placed in cans, have preservative added, and are transported in partially frozen, unfrozen, or completely frozen condition."

The Commission held, however, that certain of the commodities sought to be transported were *manufactured products* and not exempt. These commodities were described in Footnote 3 as follows:

> "Frozen strawberry and other purees; *frozen french fried potatoes;* frozen candied sweet potatoes; frozen eggs; frozen egg yolks; frozen meats; and frozen deviled crabs, deviled clams, fried scallops, ready-to-fry and fried oysters, fried fish fillets, fish sticks, codfish cakes, seafood dinners, deviled lobsters, and salmon croquettes."

During the course of the trial it was suggested that decisions relating to the agricultural exemption under the Fair Labor Standards Act might, by analogy, have some relevance to the issues before the Court. That Act (29 U.S.C.A. §§201-219) prescribes minimum standards for certain classes of labor. Among the employees exempt from the Act are those engaged in "preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market" (§213(a)(10)).

The purpose of the exemption concerned the distinctive character of agricultural labor and farm conditions, (*Abram vs. San Joaquin Cotton Oil Co.*, (1942), 46 F. Supp. 969, 973). The labor factors which influenced this legislation are not involved in the classification of commodities for rate-making purposes or in providing economical transportation to the farmer. Regulations under the Act as contained in Title 29 CFR, § 780.51, extend the first processing of vegetables "throughout each series of operations, including byproduct operations," commencing with the initial processing if performed at the same place. For example, the preparation of apples in their "raw or natural state" extends from peeling and coring to the production of pomace. The preparation of citrus fruit in its "raw or natural state" begins with the fresh fruit and includes the production of molasses from citrus waste. An examination of decisions under the Act accordingly reveals rulings which extend the stages of primary processing beyond the limits of interpretation applicable to the tariff language in this case.

SPECIFICATION OF ERROR II

Summary of Argument

1. The terms of the tariff items are clear and unambiguous and require no extrinsic evidence to aid their construction.

2. Expert testimony is not admissible to explain the terms of a tariff which are clear and unambiguous.

3. Under the rules of primary jurisdiction, when the terms of an interstate tariff are not clear and unambiguous, the Court has no jurisdiction to construe such tariff prior to a determination as to its meaning by the Interstate Commerce Commission.

4. An action based upon ambiguous terms of an interstate tariff should be stayed pending a determination by the Interstate Commerce Commission of the meaning of such terms.

Argument

Defendant, over plaintiff's objection, was permitted to introduce the testimony of defendant's witness Evan Gheen, Jr. (R. 31-53). The Court also received in evidence defendant's Exhibits 1, 2 and 3, which consisted of samples of labels in which the French fried potatoes prepared by defendant were shipped and marketed.

The Agreed Facts contained in the Pre-Trial Order are, we submit, all that was necessary to enable the Trial Court to determine the legal issues involved in the case. These facts embrace matters relating to the jurisdiction of the Court; the status of the parties; the shipments involved; the tariff items in question; a computation of the charges claimed to be due by each of the parties; the amount of the charges

actually paid; and a complete description of the process to which the potatoes were subjected. If Mr. Gheen's testimony is to be deemed relevant and accorded any weight, it must be considered necessary to enable the Court to construe the language of the tariff. The Trial Court must have determined that the language of the tariff was used in a peculiar or technical sense requiring specialized knowledge as to usages and practices in the trade, or of many intricate facts of transportation.

Expert Testimony

In the argument under Specification of Error I, we discussed a number of decisions which held that where the words of a tariff are clear and unambiguous, a question of law only is presented. In its strict sense the tariff is not subject to "construction." (*Penn. R. Co. vs. Fox & London,* supra (93 F.2d 669, 670)).

In *Black vs. Southern Pac. Co.,* supra (88 Or. 533; 171 P. 878), the Court was concerned with the question whether certain shipments were subject to a rate providing for refrigeration or a lower rate without such provision. The Trial Court allowed witnesses to testify as to the necessity for use of refrigerator cars. The Supreme Court, in reversing the Lower Court, said at page 537:

> "It is the exclusive province of the court to construe the tariff provisions involved in this

controversy, and it was therefore error to permit rate experts to construe them:"

Doctrine of Primary Jurisdiction

If the Court were to find that the language of the tariff items in question is not plain and unambiguous, but that extrinsic evidence may be necessary to determine the peculiar meaning of the language, or to establish custom and usage, then an issue of fact arises. In *Great Northern Railway Company vs. Merchants Elevator Company,* supra, (259 U.S. 285) the Court considered such a contingency in the construction of a tariff, stating at pages 291 and 292:

"When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the de-

cision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed, if the jury finds that the alleged peculiar meaning or usage is established. But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed."

This principle was reiterated in the very recent decision of the United States Supreme Court in *United States vs. Western Pacific Railroad Company,* (December, 1956), 77 Supreme Court Reporter 161. The Court grounded its decision upon the two earlier cases of *Texas & Pacific R. Co. vs. American Tie & Timber Co.,* 234 U.S. 138, and *Great Northern R. Co. vs. Merchants Elevator Co.,* supra,

(259 U.S. 285) and said (p. 165):

> "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See Far East Conference v. United States, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576."

The following are specific instances in which the doctrine was applied:

Whether a steel bomb case filled with napam jell without burster charges and fuses constituted "incendiary bombs" or "gasoline in steel drums" (*U.S. vs. Western Pacific R. Co.,* supra); whether shipments of oak railway crossties were subject to the tariff of lumber (*T.&P. Ry. Co. vs. American Tie & Timber Co.,* supra); whether shipments of electric refrigerators were classified as "cooling boxes or refrigerators and cooling or freezing apparatus

combined" under the 4th-class rate, or "cooling or freezing machines, cooling boxes or refrigerators" under the 5th-class rate (*Norge Corp. vs. Long Island R. Co.,* (1935) 77 F.2d 312); see also footnote on page 295 of 259 U.S. for additional citations.

The following are specific instances in which the doctrine was not applied:

Whether shipments of airplane, tank, and boat internal combustion engines were subject to an exception of "engines, internal combustion" under the heading "automobile parts," or "engines, steam or internal combustion, N.O.I.B.N." and "other articles" (*U.S. vs. M.K.T. R. Co.,* supra); whether shipments of paper were properly classified as "waste paper" or "spitting cups" (*Reading Co. vs. Penn Paper & Stock Co.,* supra); whether shipments of pickled fish were subject to rates on "fish, salted and pickled, (including caviar), under refrigeration," or to rates on "fish, salted and pickled, (including caviar)," (*Black vs. S.P. Co.,* supra); whether shipments of corn were subject to an exception applicable to "Grain, seed (field), seed (grass), hay or straw" (*Great Northern Ry. Co. vs. Merchants Elevator Co.,* supra); which of two minimum charge regulations was applicable to shipments of fresh meat (*Great Northern Ry. Co. vs. Armour & Co.,* supra); whether shipments of obsolete vehicle parts were subject to the rate on "auto parts and engine parts other than auto bodies having value for re-

conditioning," or the rate on "scrap iron or steel having value for remelting purposes only" (*Northwestern Auto Parts vs. Chicago B. & Q. R. Co.*, supra); see also footnote on page 295 of 259 U.S. for additional citations.

Referral to the Interstate Commerce Commission

In *United States vs. Western Pacific R. Co.*, supra (77 S.C. Rep. 161), the United States Supreme Court remanded the proceedings to the court of claims so as to permit reference to the Interstate Commerce Commission, holding that a two-year statute of limitation did not bar such reference of questions raised by way of defense.

In *Norge Corp. vs. Long Island R. Co.*, supra (77 F.2d 312), the Court observed (p. 315):

> "The court might have followed the practice suggested in Southern Ry. Co. v. Tift, 206 U.S. 428, 27 S. Ct. 709, 51 L. Ed. 1124, 11 Ann. Cas. 846, and Mitchell Coal & Coke Co. v. Penn. R. R. Co., 230 U.S. 247, 248, 33 S. Ct. 916, 57 L. Ed. 1472, and have held in abeyance its decision on the motion for summary judgment until the appellee procured a determination by the Interstate Commerce Commission of the meaning of the classification items."

In *Southern Ry. Co. vs. Tift*, cited in the last quotation, the court dissolved a temporary injunction permitting complainants to make application to the Interstate Commerce Commission, with the privilege

thereafter of renewing their application to the Court. In *Mitchell Coal Co. vs. Penn RR. Co.,* also cited, the Court stayed dismissal of the complaint so as to allow plaintiff to present its claim to the commission as to the reasonableness of the practice in question, with the right thereafter to proceed with the trial in the District Court.

In *U.S. vs. Garner,* (1955) 134 F.Supp. 16, the Court ordered the action held in abeyance until plaintiff had an opportunity to apply to the Interstate Commerce Commission for a ruling as to the reasonableness of the rates involved. The Court cited as authority for its action *U.S. vs. K. C. Southern Ry.,* 217 F.2d 763, and *Bell Potato Chip Co. vs. Aberdeen Truck Line,* 43 MCC 337.

TESTIMONY OF EVAN GHEEN, JR.
and
EXHIBITS 1, 2 AND 3

Should the Court find it proper to consider the testimony of Mr. Gheen (and Exhibits 1, 2 and 3), we call attention to the following to show that such evidence is not actually adverse to appellant's position. (The principal references are supplemented in Appendix A to this Brief.)

The French fried potato undergoes a water blanching process prior to its oil treatment (R. 34). While one purpose of the water blanching and oil treatment is to inactivate the enzymes, there are

still other reasons why the customer demands the oil process:

(a) Both the institutional user and the housewife demand the oil coating (R. 35, 53).

(b) The defendant is able to perform the oil frying more cheaply than the customer (R. 35).

(c) The oil coating prevents the individual pieces from sticking together (R. 35).

(d) The oil coating reduces absorption of oil during final preparation by the customer (R. 36, 37).

(e) The oil frying imparts a special flavor to the potato (R. 43).

(f) The French fried potato has a higher quality of preservation than the water blanched potato (R. 43, 44).

(g) The color of the product sold at retail is the same as that served at the table (R. 50).

(h) The product sold to the institutional user is a custom product, complying with individual specifications (R. 46, 47).

(i) The unthawed French fried potato requires frying in deep fat for only 1½″ to 2½″ in preparing for table use (R. 36). This demonstrates the effectiveness of the oil frying process which supplants additional minutes of water blanching applied to the raw product not undergoing French frying. It is obvious that if the original process of oil "blanching" were continued for only a fraction

of a minute, the product would be ready for the table.

Certain other features serve to distinguish the French fried product from the raw potato:

(1) The French fried potato is a more valuable product than the processed raw potato, and sells for as much as 2¢ to 3¢ a pound more (R. 37).

(2) While the raw processed potato may be used for a variety of purposes, the French fried potato may be used only as such (R. 45, 46).

The samples of labels (Exhibits 1, 2 and 3) used in packaging the product destined to the housewife are illustrative of the distinctive and specially processed character of the French fried potato. They are described as "Golden French Fried Potatoes," and depicted in their golden brown color. They are represented as having been "cooked in pure vegetable oil" (R. 46); and it is stated that "after being fried in pure vegetable oil, they are immediately quick-frozen to seal in all the goodness and food values." In marketing and shipping this product as "French fried potatoes," the producer makes these definite representations to the public at large, including the appellant.

It is to be remembered that appellee is not a producer of agricultural products. Its sole operation is that of a food processing and quick freezing plant. It sells the finished product in the normal channels

of trade ready for use. The greater part of its processing operations are designed to give the product distinctive characteristics to facilitate their sale as a superior brand under particular labels. All this is quite apparent from Mr. Gheen's testimony, taken as a whole.

But appellee's witness also testified on another and different subject. He testified concerning the history of the freight rates applied to the two classifications in question (R. 37, 38); transportation characteristics such as difference in cost of shipping (R. 37, 38); customer attitudes with respect to freight rates (R. 38); and differences in values of products shipped under the two classifications (R. 37). All such matters involve factors of rate making and classification which, if necessary for consideration in order to determine the applicable rate, are within the exclusive primary jurisdiction of the Interstate Commerce Commission in the exercise of its expert and specialized functions.

CONCLUSION

Cursory discussion of the two tariff items in question may develop apparent ambiguities and over-lapping; but presumably there must have been some valid reason for the separate classifications and the different rate levels. We submit that this purpose becomes quite obvious when we consider some of the relevant factors from the rate-making point of view.

Item 4715, which prescribes the lower rates, applies to "fresh or green" vegetables—a term not at all confusing to any housewife who does the family shopping. Broadly speaking, it refers to vegetables in the original form in which they were produced by the grower, although cleansed and treated to preserve them in that form. They are products of the soil in which the grower still has an immediate interest. Transportation rates may, in some cases at least, directly affect the grower's return on his crop.

Item 4600, on the other hand, relates to food which has been processed (usually at a plant such as appellee's) and more closely resembles a manufactured product. What had originally been known as a "fresh vegetable" has been transformed into what is commonly called a "food," having been cooked, cured or preserved and thereby committed to a particular use. Transportation rates on such commodities affect the grower only indirectly, if at all.

More than 30 years ago Congress became interested in the effect of freight rates on the welfare of farmers. By the Hock-Smith Resolution, passed in 1925, Congress directed the Interstate Commerce Commission to investigate all freight rates on farm products and reduce them to "the lowest possible lawful rates compatible with the maintenance of adequate transportation service" (43 Stat. 801-802),

and the Commission proceeded to do so. (164 ICC 619; 205 ICC 301). Some ten years later Congress passed the Motor Carrier Act but exempted from its provisions "motor vehicles used exclusively in carrying * * * agricultural commodities (not including manufactured products thereof)" (49 Stat. 545). While this exemption did not extend to railroads, it did have the effect of subjecting railroads to competition with unregulated truck transportation of agricultural commodities "not including manufactured products thereof." As anticipated by Congress, railroad rates on such exempt commodities had to be readjusted to meet that competition.

So, whether wisely or otherwise, Congress has established a policy which has had the effect of giving producers of agricultural products a certain degree of preferential treatment in the matter of freight rates. Appellee, though not such a producer, now seeks to take advantage of the lower rates designed to benefit only the growers of fresh vegetables. But appellee was expressly excluded from such benefits under the Motor Carrier Act when it ships the "manufactured products"; and we submit that it is likewise excluded from the benefits of the

lower rail tariff rates established to meet truck competition in the transportation of those same exempt agricultural commodities.

Respectfully submitted,

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APPENDIX A

Demand for Oil Processing

"Q. Is there any other purpose in oil-blanching?

A. The only other purpose would be to coat the product with oil.

Q. Why is that desirable?

A. Because the customer wants us to coat it with oil, as we can do it cheaper than he can.

Q. Is there any advantage relative to shipping?

A. There is an advantage both in the freezing and in shipping. If you don't coat it in oil, the product sometimes sticks together so that the shipper would have difficulty in separating the individual pieces. At the same time, it can be done. I wouldn't say that there is an advantage in shipping, no." (P. 35)

* * *

"Q. Now, if this potato did not have an oil coating on it, would the housewife be able to prepare it by putting it in the oven?

A. She could prepare it, but it wouldn't necessarily be something she would want.

Q. It would not be a desirable thing without this oil coating?

A. Not in our opinion.

Q. You find that true in the trade?

A. Yes.

Q. That is why you put the oil coating on it?

A. Yes." (R. 53)

* * *

"Q. Why do the institutional users want the oil on the potato?

A. Because it decreases the amount of oil that is absorbed by the potato in their own fryer, and we can buy oil cheaper than they can, and we can coat the potato cheaper than they can, and it decreases the amount of time that is required to reconstitute the product in their own shop." (R. 36, 37)

* * *

"Q. With respect to this oil-blanching process, Mr. Gheen, is any flavor imparted to the potato as well as the heat?

A. The flavor of the oil, I guess, you would say would be imparted.

Q. Would you say it is that flavor which largely distinguishes French-fried potatoes from other types?

A. That is a very vague question. In the finished product the inside of the potato is—in the finished

roduct as the ultimate user gets it the inside of the otato is very much like a baked potato and the out-ide has the flavor of oil, you might say, the crust." R. 43)

* * *

"Q. Does the French-fried potato have any greater r less qualities of preservation than the water-lanched vegetables?

A. It depends on the degree of water-blanching, or one thing, and on the inherent qualities of the otato. In a general way, a potato which has been oil-lanched would stay out in the open air for a slightly onger time than one which had not been oil-lanched. That is part of the reason for the coating f oil, is that it helps the chef in the time element hat is involved in his work." (R. 43, 44)

* * *

"Q. Now, Mr. Gheen, returning once again to these pecifications, you have indicated the specifications y color number. Now, can you give us an idea as o what times are involved there? In other words, hat is the spread, the time spread?

A. The time spread is 30 seconds. We don't set bout to produce anything higher than a No. 2 in olor. Institutional users are predominantly zero o one, from colorless to a light color. All they want s the oil coating on there. The retail housewife—

these buyers who interpret the housewife's desires say that they want something halfway between a 1 and 2 in color. To achieve a zero to one we pass it through for a period of one minute plus or minus. To achieve a 1 to 2 color we pass it through for a period varying up to one and a half minutes.

Q. The 1 to 2 color, I assume, is the color one might ordinarily find on the potatoes as served on the table; isn't that right?

A. That is correct. It is described as a light golden color." (R. 50)

* * *

"Q. Now, is your product then produced more or less in accordance with the specifications of your customer?

A. That is correct. They are.

Q. And I understand, then, that he specifies a particular shade of color which you have indicated might be No. 1, No. 2 or—how far do these designations go?

A. He designates the color. A particular buyer of frozen food, they specify the color. Others do not.

Q. Will you tell us all of these specifications of color. You indicated some numbers. How many numbers are there?

A. There are a total of four numbered colors. However, there can be color above and below the four numbered ones. The colors are 1, 2, 3 and 4, in order light, medium, dark and very dark." (R. 46, 47)

Distinguishing Features of French Fried Potato

"Q. Is the oil coated French fry a more valuable product than a French cut?

A. Approximately two cents a pound. It varies sometimes up to three cents a pound." (R. 37)

* * *

"Q. Taking the French-fried potatoes as such, in the hands of the consumer, as far as you know, it is used only as a French-fried potato; is that correct? In other words, in the course of preparation the resulting product for the one who is going to consume it is that it is identified only as a French-fried potato; it is not ordinarily adaptable for other types of cooking. For instance, would you use it in soups?

A. I don't think, by and large, that you would use it for anything else.

Q. That is right. Now, on the other hand, the other types of vegetables which have been subjected only to water-blanching might be used by the housewife for many different cooking purposes?

A. It depends on the shape of the product that is presented to them.

Q. For instance, let's take peas. Your frozen peas are used—I assume they can be boiled and served as such; is that right?

A. Correct.

Q. And they can be served in salads?

A. You would cook them first, I think.

Q. You would cook them, yes, that is right. But they could be served in salads and they could be placed in stews and soups; isn't that right?

A. Yes." (R. 45, 46)

* * *